

2011 (1) GLR 270

**GUJARAT HIGH COURT**

**Hon'ble Judges: Jayant Patel and Bankim N.Mehta JJ.**

Chandrakant Kantilal Jhaveri Versus Madhuriben Gautambhai

First Appeal No. 4676 of 2008 ; \*J.Date :- OCTOBER 19, 2010

- [CODE OF CIVIL PROCEDURE, 1908](#) Order - [6R.2](#), [6R.4](#), [7R.11](#)

**Code of Civil Procedure, 1908 - Or. 6 R. 2, 4, Or. 7 R. 11 - plaintiff's suit dismissed as plaint did not disclose cause of action - on perusal of plaint found that plaintiff had used words collusion and fraud in plaint and no further details were given - held, order of rejection of plaint has to follow under Or. 7 R. 11 of CPC, which ultimately has been passed by Trial Court - order of dismissal upheld - appeal dismissed.**

**Imp.Para:** [ [17](#) ]

**Cases Referred To :**

1. I.T.C. Limited V/s. Debts Recovery Appellate Tribunal, AIR 1998 SC 634

**Cases Relied on :**

1. [Abdul Gafur & Another V/s. State Of Uttarakhand And Others, 2008 10 SCC 97 : 2009 \(1\) GLH 377 : 2008 \(11\) Scale 263 : 2009 AIR SC 413 : 2008 \(11\) SCR 1142](#)
2. Maharaj Shri Manvendrasinhji R. Jadeja V/s. Rajmata Vijaykunverba Wd:o. Maharaja Mahendrasinhji, 1999 1 GLR 26

**Cited in :**

1. (Referred To) :- [Jayantilal Mangaldas Barot Vs. Bharatbhai Dahyabhai Barot, 2016 JX\(Guj\) 1656 : 2016 AIJEL\\_HC 236605](#)
2. (Referred To) :- [Ujiben D/o Nramtuji Ghelaji Vs. Heli Cooperative Society Limited, 2016 JX\(Guj\) 1888 : 2016 AIJEL\\_HC 237022](#)
3. (Referred To) :- [Ganpatlal Manjibhai Khatri Vs. Manguben Babaji Thakor, 2019 JX\(Guj\) 1122 : 2019 AIJEL\\_HC 241533](#)

### **Equivalent Citation(s):**

2011 (1) GLR 270 : 2010 (3) GCD 2387

### **JUDGMENT :-**

**Jayant Patel, J.**

**1** The present appeal arises against the Judgement and order dated 03.04.2006 passed below applications Exh. 19 and 23 under Order VII Rule 11 of the Civil Procedure Code, whereby the Suit has been dismissed.

**2** The short facts of the case appears to be that the plaintiff (for the sake of convenience, the parties shall be referred to as per their status in the plaint or in the present appeal) filed the suit being Special Civil Suit No. 23/04 in the Court of the Civil Judge (SD) Ahmedabad Rural for a declaration that the transaction of the Sale Deeds for the land at Survey Nos. 436/1 and 436/2 at village Gota, Taluka Dascroi Ahmedabad as bogus and unauthorised and be quashed and set aside. It was also prayed that the decree be passed for cancellation of the documents referred to in Paras 3 and 4 executed in favour of the defendants 1 and 2. The third prayer in the suit was that the defendant No. 2 be directed to handover the possession of the property to plaintiff. The fourth prayer in the suit was that defendant No. 2 be restrained from transferring or alienating the property by sale, mortgage or gift in any manner.

**3** The plaintiff in the said suit submitted an application Exh.5 for interim injunction to restrain the defendant No. 2 from transferring or alienating property by sale, mortgage, gift or otherwise until final disposal of the suit. The learned Judge did not grant any ex parte injunction, but passed the order for issuing notice on 04.02.2002. The defendants appeared in the suit and thereafter, the defendant No. 1 submitted an application for dismissal of the suit being Exh. 19 under Order VII Rule 11 of the Civil Procedure Code. Similarly, the defendant No. 2 also submitted an application for dismissal of the suit being Exh.23 under Order VII Rule 11. Both the defendants contended inter alia that the plaintiff is the real brother of defendant No. 1 and a Power of Attorney was also executed in favour of defendant No. 1 and based on such Power of Attorney, the Sale Deeds are executed. It was also stated that the consideration of the sale of the property is transferred in the account of the plaintiff and therefore, the said fact has been suppressed.

**4** The learned Judge heard the application Exh.5 for interim injunction as well as the application Exh. 19 and 23 for dismissal of the suit under Order VII Rule 11 of the Civil Procedure Code and found that the fact of execution of the Power of Attorney upon which the reliance has been placed by the defendant has been suppressed by the plaintiff in the suit and the so called communication for cancellation of the Power of Attorney is after execution of the Sale Deed. It was found by the learned Judge that the sale consideration is also transferred in the account of the plaintiff and therefore, the learned Judge

found that it is not a case for grant of any interim injunction. It was also found by the learned Judge thereafter that the Suit was not maintainable under Order VII Rule 11 of the Civil Procedure Code because there is no lawful valid cause for preferring the suit and ultimately, the injunction application was rejected and the suit was also dismissed under Order VII Rule 11 of the Civil Procedure Code vide order dated 03.04.2006. Under these circumstances, the present appeal before this Court.

**5** It is by now well settled that for the purpose of considering the case under Order VII Rule 11 of the Civil Procedure Code, averments made in the plaint are only required to be taken into consideration and the defence may not be taken into consideration. This Court had an occasion to consider the said aspects in the ease of Maharaj Shri Manvendrasinhji R. Jadeja vs. Rajmata Vijaykunverba Wd/o. Maharaja Mahendrasinhji reported at 1999 (1) GLR 26 at Paras 14,15, and 16, which reads as under:-

"14 Having noticed brief summary of the plaint and prayers earlier, it would be relevant to refer to the provisions of Order 7, Rule 11 (a) of the CPC and the scope thereof. Order 7, Rule 11 (a) of the CPC provides that the plaint shall be rejected in case where it does not disclose a cause of action. Order 7, Rule 11 (a) of the CPC is mandatory and if it is found that the plaint does not disclose a cause of action, the Court has no option but to reject the plaint. To find out whether a plaint discloses a cause of action or not, the Court has to look only to the averments made in the plaint. When a plaint is based on a document filed along with the plaint, it can, however, be considered to ascertain if plaint discloses any cause of action. Cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. The words "cause of action" mean the whole bundle of material facts which are necessary for the plaintiff to prove in order to entitle him to the reliefs claimed in the suit. What is to be done by the Court at the stage of deciding as to whether the plaint discloses any cause "of action or not is to find out from the allegation of the plaint itself as to whether a bogus, wholly vexatious or frivolous litigation is sought to be initiated under the garb of ingenuous drafting of the plaint or not because it is the duty of the Court to guard against the mischief of a litigant misusing the process of Court by entering into a false litigation merely for the purpose of harassing the other party and to nip in the bud the litigation which is sham and shabby in character, In order to find out whether the plaint discloses a cause of action or not, the averments made in the plaint and documents annexed thereto should be scrutinised meaningfully and if on such scrutiny it is found that the plaint does not disclose cause of action, it has got to be rejected in view of the provisions of Order 7, Rule 11(a) of the CPC. When it is said that the Court should take into consideration the averments made in the plaint for the purpose of deciding the question whether the averments made in the plaint

disclose cause of action or not, it does not mean that the Court is precluded from applying the statutory provisions or case-law to the averments made in the plaint. If an assertion made in the plaint is contrary to statutory law or case-law, it cannot be considered as disclosing cause of action. In ITC Ltd. (Supra), bank had filed suit against the appellant and others and claimed relief for a sum of Rs. 52,59,639-66 ps. After the suit was filed, it was transferred to the Debt Recovery Tribunal. Before the Tribunal, an application was filed by the appellant under Order 7, Rule 11 of the CPC for rejecting the plaint, so far as appellant was concerned, on the ground that no valid cause of action had been shown against the appellant. That application was rejected by the Tribunal. Against the said order, an appeal was filed before the Debts Recovery Appellate Tribunal.

The appeal was dismissed in limine. Thereupon a writ petition was filed by the appellant, which was dismissed holding that the question should be decided at the trial. Against that judgment, the appellant had filed an appeal before the Division Bench of the High Court, which was also dismissed. The matter was thereafter carried before the Supreme Court. After taking into consideration the decided cases on the point whether there was fraudulent movement of goods under which letter of credit was obtained which in turn entitled the bank to file the suit, the Supreme Court held that that point was already decided by decision of the Supreme Court in U.P. Co-operative Federation's case and therefore the allegation of non-supply of goods by the sellers to the buyers did not by itself amount, in law, to a plea of "fraud" as understood in this branch of the law and hence by merely characterising alleged non-movement of goods as "fraud", the bank was not entitled to claim that there was a cause of action based on fraud or misrepresentation. While allowing the appeal, what is emphasised by the Supreme Court is that the question whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7, Rule 11 of the CPC has to be decided with reference to averments made in the plaint and clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint. In view of this decision of the Supreme Court, it is evident that if something purely illusory has been stated with a view to get out of Order 7, Rule 11 of the CPC by resorting to clever drafting, it cannot be said that the plaint discloses a cause of action and if a clear right to sue is not shown in the plaint, it is liable to be rejected. 15 In the light of scope of Order 7, Rule 11(a) of the CPC, we would now proceed to examine different submissions made on behalf of the appellant. The submission that the plaint was presented on December 26, 1978, whereas issues for determination were framed by the learned Judge on July 21, 1981 and therefore the application filed by the respondent under Order 7, Rule 11 (a) of the CPC on June 26, 1996 should not have

been entertained at such a long distance of time, has no substance. As noted earlier, the provisions of Order 7, Rule 11 (a) of the Code of Civil Procedure are mandatory in nature. It is the duty of the Court to reject the plaint which does not disclose cause of action. If a plaint can be rejected at threshold of the proceedings, we do not see any reason as to why it cannot be rejected at any subsequent stage of the proceedings. Even if after framing of issues, the basic defect in the plaint persists, namely, absence of cause of action, it is always open to the contesting defendants to insist that the plaint be rejected under Order 7, Rule 11 of the CPC and the Court would be acting within its jurisdiction in considering such a plea. Order 7, Rule 11 of the CPC does not place any restriction or limitation on the exercise of the court's power. It does not either expressly or by necessary implication provide that power under Order 7, Rule 11 of the CPC should be exercised at a particular stage only. In the view we are taking, we are fortified by the judgment of the Supreme Court rendered in the case of ITC Ltd. (Supra). Therein, the suit was filed by the Bank in the year 1985. In 1995, it was transferred to Debt Recovery Tribunal and thereafter an application was filed by the appellant under the provisions of Order 7, Rule 11 of the CPC for rejection of the plaint as not disclosing any cause of action against the appellant. The application filed by the appellant was rejected not only by the Tribunal and Appellate Tribunal, but also by the High Court. When the matter reached before the Supreme Court in the year 1997, it was contended that the power under Order 7, Rule 11 of the CPC should not be exercised after such a long lapse of time, more particularly when issues were framed. That plea has been negated by the Supreme Court in following terms:-

"13. We may state that in the context of Order 7 Rule 11 CPC, a contention that once issues have been framed, the matter has necessarily to go to trial has been clearly rejected by this Court in Azhar Hussain vs. Rajiv Gandhi (SCC p.324) as follows: (SCC Para 12)

"In substance, the argument is that the Court must proceed with the trial, record the evidence, and only after the trial... is concluded that the powers under the Code of Civil Procedure for dealing appropriately with the defective petition which does not disclose cause of action should be exercised. With respect to the Learned Counsel, it is an argument which is difficult to comprehend. The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court..."

The abovesaid judgment which related to an election petition is clearly applicable to suits also and was followed in Samar Singh vs. Kedar Nath. We therefore hold that the fact that issues have been framed in the suit cannot

come in the way of consideration of this application filed by the appellant under Order 7 Rule 11 CPC."

17. In view of settled legal position, plea that powers under Order 7, Rule 11 (a) of the CPC should not have been exercised after framing of issue cannot be upheld and is hereby rejected." (Emphasis supplied)

**6** The aforesaid shows that if it is found that the plaint does not disclose the cause of action, the Court has no option but to reject the plaint. But for deciding such aspects of cause of action, the Court should take into consideration the averments made in the plaint for the purpose of deciding the question as to whether the averment made in the plaint discloses the cause of action or not and while doing so, it cannot be said that the Court is precluded from applying the statutory provisions or case law to the averments made in the plaint. If the assertion made in the plaint is contrary to the statutory law or case law, it cannot be considered as the valid cause of action.

**7** The examination of the facts of the present case as averred by the plaintiff in the plaint shows that the execution of the Power of Attorney by the plaintiff in favour of defendant No. 1 has been admitted. The execution of the Sale Deed by defendant No. 1 in the capacity as Power of Attorney of plaintiff is also admitted. The basis of the suit is that there is misuse of the Power of Attorney and the transactions are entered into between the defendant No. 1 in favour of defendant No. 2 in collusion and are fraudulent. No material statement of facts are stated in the plaint as to how such transactions are entered into in collusion and are fraudulent transactions. The pertinent aspect is that the Power of Attorney which is referred to by the plaintiff does expressly provide for power to sell the property. Under these circumstances, unless the Power of Attorney is cancelled, the authority under the Power of Attorney would continue. It is not the case of the plaintiff that prior to the execution of the Sale Deed the Power of Attorney was cancelled nor there is any prayer in the suit for declaration that the Power of Attorney be declared as cancelled. There is no averment whatsoever about the details as to how the transactions have taken place in collusion between the defendant No. 1 and defendant No. 2. No details are stated as to how the defendant No. 1 has misused the Power of Attorney of the plaintiff. One ground stated in the plaint is that the intimation was not given by the defendant No. 1 to the plaintiff, but thereby, it cannot be said that any collusion or fraud is played since it is a matter between the plaintiff in the capacity as principal and the defendant No. 1 as attorney.

**8** Under these circumstances, if there is no details whatsoever for any alleged fraud or collusion by the defendants, it can be said that the provisions of Order VII Rule 11 of the Civil Procedure Code would apply. The pertinent aspect is that if the averments stated in the plaint is considered as it, it does not disclose any cause of action for the prayers made in the suit.

**9** Mr. Gandhi, Learned Counsel appearing for the appellant attempted to contend that as the property has been sold away at a very throwaway price by the Power of Attorney holder, i.e. defendant No. 1 in favour of defendant No. 2, the transaction is in collusion and fraudulent. However, Mr. Gandhi, Learned Counsel for the appellant has not been able to show us any averment in the plaint in support of the said contention. Further, merely because the quantum of consideration is less per se would not result into a ground for setting aside of the sale.

**10** Apart from the above, there are no prayers in the plaint for declaration for cancellation of the Power of Attorney nor there is any averment in the plaint that the attorney has misused the fiduciary capacity by giving the material particulars of the alleged misuse.

**11** It was contended by the Learned Counsel appearing for the appellant that the plaint could be amended and even in absence of the amendment in the plaint, the evidence could be led for showing the mode and manner of fraud by giving material particulars.

**12** We are afraid such can be considered when the matter is at the stage of Order VII Rule 11 of the Civil Procedure Code. It is not the case of the plaintiff that any application for amendment was made and that was rejected by the Trial Court. Further, in absence of any pleadings, there would not be any issue over which the parties may lead the evidence. At this stage, we may refer to the provisions of the Order VI Sub-Rules 2 and 4:

"2. Pleading to state material facts and not evidence

(1) Every pleading shall contain, and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved.

(2) Every pleading shall, when necessary, be divided into Paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate Paragraph.

(3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words."

"4. Particulars to be given where necessary

In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are

exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."

**13** The aforesaid shows that as per sub-Rule 2 of Order VI of Civil Procedure Code, the pleading has to contain a statement in a concise form of material facts on which the party relies for his claim or defence. But, it may not be evidence, which is to be proved. Sub-rule 4 provides that whenever the pleading is for misrepresentation, fraud, breach of trust, willful default or undue influence, the particulars shall be stated in the pleadings. Neither exist in the present case for any material facts or particulars for the alleged collusion or fraud for which the prayers have been made in the plaint and everywhere the word fraud and collusion is used without any details or the mode or manner or material particular of such so called fraud or collusion.

**14** In order to further consider the scope of judicial scrutiny while exercising the power under Order VII Rule 11 of the Code of Civil Procedure, the reference to the decision of the Apex Court in the case of Abdul Gafur & Another vs. State of Uttarakhand and others reported in (2008) 10 SCC 97 would be relevant. In the said decision, at Para 19, it was observed by the Apex Court as under:-

"19. It is trite that the rule of pleadings postulate that a plaint must contain material facts. When the plaint read as a whole does not disclose material facts giving rise to a cause of action which can be entertained by a civil court, it may be rejected in terms of Order 7, Rule 11 of the Code. Similarly, a plea of bar to jurisdiction of a civil Court has to be considered having regard to the contentions raised in the plaint. For the said purpose, averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety and the Court would not be justified in determining the question, one way or the other, only having regard to the reliefs claimed de'hors the factual averments made in the plaint. (See: Church of North India vs. Lavajibhai Ratanjibhai)

**15** At this stage, we may refer to the decision of the Apex Court in the case of "I.T.C. Limited vs. Debts Recovery Appellate Tribunal" reported at AIR 1998 Supreme Court 634 and more particularly the observations made by the Apex Court at Para 27, which reads as under:-

"27. As stated above, non-movement of goods by the seller could be due to a variety of tenable or untenable reasons, the seller may be in breach of the contract but that by itself does not permit a plaintiff to use the word 'fraud' in the plaint and get over any objections that may be raised by way of filing an application under Order 7, Rule 11, CPC. As pointed out by Krishna Iyer, J. in T. Arivandandam's case (AIR 1977 SC 2421), the ritual of repeating a word or creation of an illusion in the plaint can certainly be unravelled and exposed by the Court while dealing with an

application under Order 7, Rule 11 (a). Inasmuch as the mere allegation of drawal of monies without movement of goods does not amount to a cause of action based on 'fraud', the Bank cannot take shelter under the words 'fraud' or 'misrepresentation' used in the plaint."

We find that here also, except again and again using the word "collusion" and "fraud" in the plaint, no details have been given nor it is demonstrated in the manner in which any prejudice in law by breach of any rights in law has been caused resulting into valid cause of action.

**16** It was submitted by the Learned Counsel for the appellant Mr. Gandhi that the plaint can be rejected under Order VII Rule 11 of the Civil Procedure Code only when the suit is barred by any statutory provisions.

**17** It is true that the same is one of the requirement as provided under Order VII Rule 11, Clause (d) of the Civil Procedure Code, but thereby it cannot be said that the suit if does not disclose the cause of action, Order VII Rule 11 of the Civil Procedure Code will have no applicability and the reason being that the clause expressly provides for disclosure of the cause of action.

**18** In view of the above, we find that when the plaint does not disclose any valid cause of action for the relief prayed in the suit/plaint, no useful purpose would be served in entertaining the contention that the Trial Court did not consider the matter in detail on the aspects which we have considered hereinabove or that the Trial (Court has not recorded proper valid reason for such purpose. We find that the present proceedings are by way of appeal and therefore appeal being continuous proceedings of the Suit, it would not be outside the jurisdiction of this Court to consider the case on the aspects other than those which are considered by the Trial Court for examining as to whether the order for dismissal of the plaint under Order VII Rule 11 can be maintained or not. We find that such being the position, as referred to hereinabove, our conclusion would be that as no averments are made in the plaint which disclose valid cause of action for the reliefs prayed in the plaint/suit. Hence, the order for rejection of the plaint has to follow under Order VII Rule 11 of the Code of Civil Procedure Code, which ultimately has been passed by the Trial Court.

**19** In view of the above, the appeal fails. Hence, dismissed. No order as to costs.